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Public Prosecutor v Alfian

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–162 OF 2008

HASAN LAH, ABDUL MALIK ISHAK AND BALIA YUSOF JJCA

14 SEPTEMBER 2011

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Criminal Procedure — Defence — Adverse inference — Presumption of drug trafficking against accused — Whether onus on accused to call material witnesses to disprove presumption — Whether failure to do so warranted drawing of adverse inference — Whether prosecution at fault for not calling witnesses material to defence's case — Whether accused's story that he was innocent carrier credible

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The respondent ('Alfian'), an Indonesian, was charged in the High Court for trafficking in 284.23g methamphetamine pursuant to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At the end of the prosecution's case the court found that the prosecution had made out a prima facie case as per the

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charge and called on Alfian to make his defence. At the close of the defence's case, the High Court found Alfian guilty on a reduced charge of possession under s 6 of the Act and sentenced him to 17 years jail and 10 strokes of the rotan. The prosecution appealed the decision to the Court of Appeal arguing that Alfian should have been convicted of trafficking as per the charge.

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According to the facts of the case, Alfian was at the Stulang Laut Ferry Jetty at Johor Bahru to return to Indonesia, when customs officers wanted to inspect the goods he was carrying. When they noticed him behaving uneasily and suspiciously, they took him to the customs inspection room where, in the presence of other customs officers, Alfian was subjected to a body search. A

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package was recovered from inside his underwear which contained the drugs as stated in the charge. In his defence, Alfian said he was carrying the package as an errand for his employer, named Ayub, in Indonesia; that Ayub told him to collect the package from a person named Zul in Kuala Lumpur and that he had concealed the package inside his underwear because Ayub had told him the

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package was valuable and that he should evade paying customs duties. Alfian said Ayub did not tell him what was in the package and neither did he open it to check. Alfian also said he gave the investigating officer of the case the necessary details in order to contact Ayub and Zul but no effort was taken by the officer to trace them to verify his (Alfian's) testimony. Although the trial

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judge inferred from the facts that Alfian had knowledge of the drugs in the package and had invoked the presumption in the Act that he was trafficking in the drugs, the judge, at the close of the defence's case, held Alfian was an 'innocent carrier' and that he had rebutted the said presumption. The judge held the prosecution could have refuted Alfian's defence of being an innocent

carrier if it had investigated Zul's whereabouts and had procured and produced in court the record of the phone calls made from Alfian's handphone.

Held, unanimously allowing the appeal, substituting the High Court's conviction and sentence with a conviction under s 39B(1)(a) of the Act and sentencing the respondent to death:

(1) After having called the respondent to enter his defence on the trafficking charge, the trial judge went against his earlier decision that the respondent had knowledge of the dangerous drugs and found him guilty of possession punishable under s 39A(2) of the Act. He had erred in law and on the facts (see para 31).

(2) The defence was totally unreasonable and did not rebut the presumption of trafficking on the balance of probabilities. A reasonable tribunal armed with the same facts and properly directing itself would have convicted the respondent for trafficking (see para 38).

(3) The issue of 'innocent carrier' must necessarily relate to the fact the respondent claimed he had no knowledge about the contents of the package. But the surrounding facts showed he knew the package contained drugs. If the package was an 'innocent item' there was no reason not to put it in the black bag he was carrying. The respondent knew the package contained the drugs and that was why he put it inside his underwear (see paras 40 & 55).

(4) The onus was on the respondent to prove, on balance of probabilities, that he was not trafficking in the drug, and to discharge that burden he had the onus of calling material witnesses like Ayub and Zul. His failure to do so entitled the court to draw an adverse inference against him (see para 73).

(5) The prosecution could not be blamed for its inability to trace Ayub and Zul. Just because the prosecution could not trace Ayub and Zul did not entitle the respondent to an acquittal. The respondent was in possession of the drugs at the material time as per the charge and what transpired before his arrest was not for the prosecution, but entirely up to the respondent, to prove (see paras 72 & 74).

[Bahasa Malaysia summary

Responden ('Alfian'), seorang warga Indonesia, didakwa di Mahkamah Tinggi bagi pengedaran 284.23g methamphetamine di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Di akhir kes pendakwaan, mahkamah mendapati pihak pendakwaan telah membuktikan kes prima facie bagi setiap pertuduhan dan memanggil Alfian untuk membuat pembelaannya. Di penutup kes pembelaan, Mahkamah Tinggi mendapati Alfian bersalah atas pertuduhan milikan yang dikurangkan di bawah s 6 Akta dan menjatuhkan

hukuman penjara 17 tahun dan sepuluh sebatan. Pihak pendakwaan merayu keputusan tersebut kepada Mahkamah Rayuan, menghujahkan bahawa Alfian sepatutnya disabitkan bagi mengedar seperti pertuduhan. Menurut fakta kes, Alfian berada di Jeti Feri Stulang Laut di Johor Bahru untuk kembali ke Indonesia, apabila pegawai kastam hendak memeriksa barang-barang yang dibawa olehnya. Apabila mereka melihat dia berkelakuan gelisah dan mencurigakan, mereka membawanya ke dalam bilik pemeriksaan kastam, yang mana, di hadapan pegawai-pegawai kastam yang lain, Alfian telah dikenakan carian badan. Satu bungkusan diperolehi daripada seluar dalamnya yang mengandungi dadah sebagaimana yang dinyatakan dalam pertuduhan tersebut. Dalam pembelaannya, Alfian berkata dia membawa bungkusan tersebut sebagai arahan majikannya, yang bernama Ayub, di Indonesia; bahawa Ayub memberitahunya untuk mengambil bungkusan daripada seorang yang bernama Zul di Kuala Lumpur; dan bahawa dia telah menyembunyikan bungkusan di dalam seluar dalamnya kerana Ayub telah memberitahunya bahawa bungkusan tersebut berharga dan bahawa dia harus mengelak daripada membayar duti kastam. Alfian berkata Ayub tidak memberitahunya apa yang berada di dalam bungkusan tersebut dan tidak dia membukanya untuk memeriksa. Alfian juga berkata dia telah memberikan pegawai penyiasat kes tersebut butir-butir yang perlu untuk menghubungi Ayub dan Zul tetapi tiada usaha diambil oleh pegawai tersebut untuk mengesan mereka bagi mengesahkan keterangannya (Alfian). Walaupun hakim bicara menyimpulkan daripada fakta tersebut bahawa Alfian mempunyai pengetahuan mengenai dadah dalam bungkusan tersebut dan telah membangkitkan anggapan dalam Akta bahawa dia mengedar dadah, hakim, di penutup kes pembelaan, memutuskan Alfian adalah 'innocent carrier' dan bahawa dia telah menyangkal anggapan tersebut. Hakim memutuskan pihak pendakwaan sepatutnya boleh menyangkal pembelaan bahawa Alfian menjadi pembawa yang tidak bersalah jika dia telah menyiasat di mana beradanya Zul dan telah mendapatkan dan mengemukakan di mahkamah rekod telefon panggilan yang dibuat dari telefon bimbit Alfian.

Diputuskan, membenarkan rayuan, menggantikan sabitan dan hukuman Mahkamah Tinggi dengan sabitan di bawah s 39B(1)(a) Akta dan menjatuhkan hukuman mati ke atas responden:

(1) Selepas responden dipanggil untuk membela diri atas tuduhan mengedar, hakim bicara mencanggahi keputusannya yang lebih awal bahawa responden mempunyai pengetahuan mengenai dadah berbahaya dan didapati bersalah bagi pemilikan yang boleh dihukum di bawah s 39A(2) Akta. Beliau telah terkhilaf dari segi undang-undang dan fakta-fakta (lihat perenggan 31).

(2) Pembelaan tersebut adalah sama sekali tidak munasabah dan tidak menangkis anggapan mengedar atas imbangan kebarangkalian. Sesuatu

tribunal yang munasabah berbekalkan fakta-fakta yang sama dan dengan betul mengarahkan dirinya akan menyabitkan responden atas pengedaran (lihat perenggan 38).

(3) Isu 'innocent carrier' mestilah berhubungkait dengan fakta responden yang mendakwa dia tidak mempunyai pengetahuan mengenai kandungan bungkusan tersebut. Tetapi fakta persekitarannya menunjukkan dia mengetahui bungkusan tersebut mengandungi dadah. Jika bungkusan tersebut adalah 'innocent item', tidak ada sebab untuk tidak memasukkan ia ke dalam beg hitam yang dibawanya. Responden mengetahui bungkusan tersebut mengandungi dadah dan sebab itu dia meletakkan ia di dalam seluar dalamnya (lihat perenggan 40 & 55).

(4) Beban terletak ke atas responden untuk membuktikan, atas imbangan kebarangkalian, bahawa dia tidak mengedar dadah tersebut, dan untuk melepaskan beban tersebut, dia mempunyai tanggungjawab memanggil saksi-saksi material seperti Ayub dan Zul. Kegagalannya berbuat sedemikian memberi hak kepada mahkamah untuk membuat inferens yang bertentangan (lihat perenggan 73).

(5) Pihak pendakwaan tidak boleh dipersalahkan atas ketidakupayaannya untuk mengesan Ayub dan Zul. Hanya kerana pihak pendakwaan tidak dapat mengesan Ayub dan Zul tidak melayakkan responden kepada pembebasan. Responden mempunyai milikan ke atas dadah pada masa material seperti yang dipertuduh dan apa yang berlaku sebelum dia ditangkap bukanlah bagi pihak pendakwaan, tetapi terpulang kepada responden untuk membuktikannya (lihat perenggan 72 & 74).]

Notes

For cases on adverse inference, see 5(1) *Mallal's Digest* (4th Ed 2010 Reissue) paras 1774–1776.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chan Pean Leon v PP [1956] MLJ 237 (refd)
Choo Yoke Choy v PP [1992] 2 MLJ 632; [1992] 1 CLJ (Rep) 43, SC (refd)
Director of Public Prosecutions v Brooks [1974] 2 All ER 840, HL (refd)
Ghazalee Kassim & Ors v PP [2009] 4 CLJ 737, FC (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137; [1993] 2 AMR 27, SC (refd)
Ho Seng Seng v Rex [1951] 17 MLJ 225 (refd)
Lee Chee Meng v PP [1992] 1 MLJ 322; [1992] 1 CLJ (Rep) 168, SC (refd)
Leow Nghee Lim v Reg [1956] MLJ 28 (refd)
Mat v PP [1963] MLJ 263 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (refd)
Neo Koon Cheo v Reg [1959] MLJ 47 (refd)

A *Pang Chee Meng v PP* [1992] 1 MLJ 137, SC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
Pendakwa Raya v Kang Ho Soh [1992] 1 MLJ 360, HC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1, FC (refd)
PP v Chow Kam Meng [2001] 7 CLJ 387, HC (refd)
B *PP v Mohamad Fairus bin Omar* [1998] 5 MLJ 729, HC (refd)
PP v Mohd Farid bin Mohd Sukis & Anor [2002] 3 MLJ 401, HC (refd)
PP v Tan Kok An [1996] 1 MLJ 89; [1996] 2 CLJ 96, HC (refd)
Prakash Chand v State (Delhi Admn) AIR [1979] SC 400 (refd)
C *Reg v Thomas Smith* 1855 6 Cox CC 554 (refd)
Saludin bin Surif v PP [1997] 3 MLJ 317, CA (refd)
Shamsuddin bin Hassan & Anor v PP [1991] 3 MLJ 314, SC (refd)
Surentheran a/l Selvaraja v PP [2006] 1 MLJ 641; [2005] 2 CLJ 264, CA (refd)
Teh Hock Leong v PP [2010] 1 MLJ 741, FC (folld)
D *Toh Ah Loh and Mak Thim v Rex* [1949] MLJ 54, CA (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259; [2001] 1 CLJ 381, FC (refd)
Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (refd)
Wong Nam Loi v PP [1997] 3 MLJ 795, CA (refd)
E *Yee Ya Mang v PP* [1972] 1 MLJ 120 (refd)

Legislation referred to

Criminal Procedure Code s 277
Dangerous Drugs Act 1952 ss 6, 12(2), 37(d), 37(da), 37(da)(iii), 37(da)(xvi),
F 39A(2), 39B(1)(a), 39B(2), Part III, First Schedule
Dangerous Drugs Act [Jamaica] s 7(c)
Dangerous Drugs Ordinance [SG] s 37(d)
Evidence Act 1950 ss 8(2), 9

G **Appeal from:** Criminal Trial No MT(1) 45–01 of 2006 (High Court, Johor Bahru)

Siti Rafidah bt Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant/prosecution.
Pritam Singh Brrard (Syarikat Singh) for the respondent/accused.
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Abdul Malik Ishak JCA (delivering judgment of the court):

BACKGROUND

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[1] The respondent ('Alfian') was charged for trafficking in 284.23g of methamphetamine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) ('the Act') and punishable under s 39B(2) of the Act. The charge against the respondent reads as follows:

Bahawa kamu pada 22.5.2005 jam lebih kurang 7.45 pagi di Laluan Keluar di Terminal Jeti Stulang Laut di dalam daerah Johor Bahru di dalam Negeri Johor Darul Takzim telah mengedar dadah berbahaya iaitu 284.23 gram methamphetamine dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] The trial proceeded before the High Court at Johor Bahru. The learned High Court judge, at the end of the prosecution's case, on a maximum evaluation found that the prosecution had successfully proved a prima facie case and called his defence for trafficking in dangerous drugs as per the charge.

[3] The respondent elected to give his evidence under oath and he was cross-examined and re-examined (see pp 27–33 of the appeal record). Yet, the learned High Court judge in his judgment at p 44 of the appeal record stated that the respondent gave his evidence 'on his behalf through the dock'.

[4] Be that as it may, at the close of the defence's case, the learned High Court judge found the respondent guilty on a reduced charge of possession under s 6 of the Act (it should be s 12(2) of the Act) punishable under s 39A(2) of the Act and sentenced him to 17 years imprisonment with effect from the date of his arrest and ten strokes of the rattan (see p 37 of the appeal record). Yet, the learned High Court judge in his judgment at p 48 of the appeal record stated that the respondent was sentenced to 14 years imprisonment with effect from the date of his arrest and ten strokes of the rattan. It must be borne in mind that the charge stipulated the dangerous drugs to be methamphetamine which falls under Part III of the First Schedule to the Act and it is caught, if at all, under s 12(2) of the Act and not under s 6 of the Act as suggested by the learned High Court judge.

[5] Aggrieved, the public prosecutor appealed to this court and argued that the respondent should be convicted for trafficking in dangerous drugs, to wit, 284.23g of methamphetamine.

FACTS OF THE CASE

[6] On 22 May 2005, customs officer by the name of Mohd Mazle bin Hamzah ('SP5') was on duty at the Stulang Laut Ferry Jetty in the free trade zone at Stulang, Johor Bahru ('the zone') between 7am – 2pm. At that material time, SP5 was on duty together with two other customs officers, namely, Mohd Fazli bin Mohamad ('SP6') and Ahmad Nasir bin Hamidon ('SP7'). Specifically, SP5 was tasked with the duty of inspecting ferry passengers at the zone.

[7] At about 7.45am, SP5 saw a man (later identified as the respondent) leaving the immigration counter and walking towards the customs counter where SP5 was on duty. SP5 called the respondent as SP5 wanted to inspect the goods carried by the respondent. Upon inspecting the goods, SP5 noticed that the respondent was acting suspiciously and in a state of uneasiness ('dalam keadaan tidak selesa dan serba salah'). This prompted SP5 to order the respondent to proceed to the customs inspection room in order to conduct a thorough examination on the respondent and the goods carried by him. For this exercise, SP5 was assisted by SP6 and SP7.

[8] In that customs inspection room, SP5 ordered the respondent to open his jacket and his trousers. The respondent complied. When the respondent opened his trousers, SP5 saw a protrusion from the front portion of the respondent's trousers and upon being directed, the respondent took out the protrusion which was in fact a package ('exh P5A') that was placed in the respondent's underwear. SP5 then requested SP7 to inform senior customs officer Mohd Esam bin Salim ('SP8') about the discovery of the package (exh P5A) and they all then waited for the arrival of another senior customs officer Raja Abdul Aziz bin Raja Ahmad ('SP9') to arrive.

[9] The evidence of SP5 was corroborated by SP6 and SP7.

[10] In his testimony, SP9 confirmed that upon receipt of the telephone call from SP8, SP9 went to the inspection room and saw the package (exh P5A) on the table. SP9 then read the caution to the respondent and asked the respondent about the package (exh P5A). Initially, the respondent kept quiet. SP9 then directed customs photographer Mohd Nazeri ('SP3') to take the photograph of the package (exh P5A). SP9 then marked the package with an alphabet 'A' and proceeded to open the package (exh P5A) in the presence of the respondent and, at the same time, SP9 asked the respondent what the package was and the respondent answered spontaneously 'dadah'.

[11] On the instruction of SP9, SP5 prepared the search list ('exh P14') and it was duly signed by the respondent. On 22 May 2005 at 5.32pm, SP9 lodged a police report vide Report No JBS/012528/05 and his police report was marked as exh P21 and it was worded as follows (see p 85 of the appeal record):

> Pada 22.5.2005 lebih kurang kurang jam 7.45 pagi, pegawai kastam 3780 telah menahan seorang lelaki Indonesia bernama Alfian No: Pasport N.205371 di Balai Berlepas Terminal Feri Stulang Laut, Johor Bahru. Hasil pemeriksaan rapi telah menjumpai satu bungkusan yang disyakki dadah di dalam seluar bahagian hadapan lelaki tersebut. Kes kemudiannya telah diserahkan kepada Penguasa Kastam Pencegah Raja Abdul Aziz bin Raja Ahmad untuk tindakan selanjutnya.

[12] On 22 May 2005, SP9 handed the respondent and the exhibits to the investigating officer — senior customs officer Khasmuri bin Muhammad ('SP10'). SP10 kept the exhibits in the steel cabinet of his office and on 24 May 2005 he handed the exhibits to the government chemist by the name of Muhammad Yazid bin Ibrahim ('SP4') who analysed and confirmed the exhibits to be dangerous drugs as per the charge. On 27 July 2005 at 11.40am, SP4 returned the exhibits together with the chemist report to SP10. Later, the exhibits were kept in the exhibits' store by customs officer Mohd Hanif bin Md Matar ('SP2').

ANALYSIS

[13] In considering ground one of the petition of appeal wherein it was averred that the learned High Court judge erred in finding the respondent guilty of possession punishable under s 39A(2) of the Act at the end of the defence case, we must, at the outset, commend the learned High Court judge for analysing the prosecution's evidence on a maximum evaluation basis using the test enunciated by the Federal Court in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 and in so doing His Lordship correctly found that the prosecution had successfully proved a prima facie case for the offence of trafficking in dangerous drugs as per the charge. At pp 41–42 of the appeal record, this was what the learned High Court judge said:

> Turning to the fact situation herein it is in evidence that the package P5A containing the incriminating drugs was found on the person of the accused, placed in front and underneath the underwear of the accused under the accused's trousers. This piece of evidence was led by SP5 and confirmed by SP6 and SP7. The evidence that the incriminating drugs found underneath the accused underwear to my mind establish that he had physical custody and control and hence the prosecution has successfully made out a prima facie case on the physical element. However the physical element of custody and control is insufficient to establish possession as the mental element of knowledge has to be proved. Knowledge is invariably (an) element that cannot be proved by direct evidence as no one can see through as to what is happening in a person's mind. Hence the court has to invariably look at the surrounding circumstances and by inference thereof deduce whether such knowledge exists.
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> The question that I have to address is whether the factum of the presence of P5A on the person of the accused underneath his underwear is a surrounding circumstance which I can infer that the accused has knowledge of the incriminating drugs as to extablish the mental element of mens rea.

[14] Further down the same page of the appeal record and spilling over to p 43, His Lordship continued in serious vein:

It is also appropriate at this juncture to emphasise that there is no requirement in law that the prosecution must prove that the accused has exact knowledge of the dangerous drugs in his possession. Lord Reid in *Warner v Metropolitan Police Commissions* [1968] 2 All ER 356 had this to say about knowledge at p 367 where he stated:

> And it is commonplace that if the accused had a suspicion but deliberately shut his eyes the court or jury is well entitled to hold him guilty. Further, it would be pedantic to hold that it must be shown that the accused knew precisely which drug he had in his possession. Ignorance of the law is no defence and in fact virtually everyone knows that there are prohibited drugs. So it would be quite sufficient to prove facts from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession. That would not lead to an unreasonable result.

Augustine Paul J (as he then was) in *Public Prosecutor v Mohd Farid Mohd Sukis & Anor* [2002] 3 MLJ 401 in approving *Warner*'s case stated:

> It must be observed that in proving this element, the obligation of the prosecution is only to establish that the accused had knowledge, either by direct evidence or by way of inference of the existence of the dangerous drug but not its qualities.

[15] Still continuing on the same page of the appeal record and spilling over to p 44, His Lordship had this to say about actual possession:

> Turning to the factual matrix herein the undisputed fact that the incriminating drug was tucked in his underwear provides ample evidence for the court to draw an inference that the accused knew that the package P5A so tucked and found on his person contained the incriminating drug methamphetamine. To my mind the presence of P5A so placed under his underwear, in the absence of any reasonable explanation by the accused leads me to draw a strong inference that the accused knew that the package P5A contained methamphetamine.
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> As both the physical element of custody and control and the mental element of knowledge having been proved it is my finding that the accused has actual possession of the drug independent of the statutory presumption under s 37(d) of the Act.
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> In arriving at my finding aforesaid I have duly taken into consideration the suggestions made by learned defence counsel to the prosecution's witnesses and the applicable legal position that such suggestions are not evidence and remains suggestion — see *Public Prosecutor v Chia Leong Poo* [2000] 6 MLJ 705.

As was (aptly) put by Augustine Paul J in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ at p 121 in approving the dictum in *Emperor v Karimuddi Sheikh* AIR (1932) Cal 73:

> mere suggestions by a pleader or advocate for the accused do not amount to evidence by the face suggested unless they are either partly or wholly accepted of the witness for the prosecution.

[16] In regard to trafficking in dangerous drugs, this was what His Lordship had to say at p 44 of the appeal record:

> The weight of the methamphetamine herein being 284.23g which is more that the statutory minimum of 15g the presumption under s 37(da)(iii) of the Act is activated and applicable and the accused is (called) upon to enter his defence.

[17] The defence of the respondent was considered at length by the learned High Court judge. This was what His Lordship said at pp 44–45 of the appeal record:

> The accused gave evidence on his behalf through the dock pertaining to his defence and the court is subjected to consider all the evidence adduced as provided for under s 182A of the Criminal Procedure Code. The sworn testimony of the accused in relation to the suggestions made to the prosecution's witnesses at the prosecution's stage has concretised into evidence which the court has to conduct a maximum evaluation against the evidence as adduced through the prosecution's witnesses.
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> In support of his defence the accused stated that he worked in a provision shop owned by one Ayub (in) Batam. He was requested by Ayub to collect a package and a calligraphy from one Zul in Kuala Lumpur. On 18 May 2005 at about 6pm he arrived at the Stulang Laut Ferry Terminal from Batam and took a bus from Larkin Bus Terminal to Kuala Lumpur. He arrived in Kuala Lumpur at 12.00 midnight and stayed with his friend Herman in a flat fronting Menara Safuan Plaza. The next day he went sight seeing in Kuala Lumpur and on 21 May 2005 he met Zul in Chow Kit. Prior to meeting Zul he had telephoned Zul at the number given by Ayub using his handphone. Zul handed to him the calligraphy and a package and informed him to take good care of the package and calligraphy entrusted to him. He then left Kuala Lumpur by taking a bus from Puduraya at about 11pm and arrived in Johore Bahru at about 5am on 22 May 2005. Between 5am to 6am he was at coffee shop in Larkin and at about 6am he left for the Stulang Laut Ferry Terminal. He bought the ferry ticket for Batam and after clearing immigration he went to the customs counter carrying with him a black bag (P11) and the calligraphy (P12).
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> He was then bodily searched by the (customs) officer who found the package P5A tucked in his underwear. He was requested to take out the package which he did and a short while later upon arrival of a few other (customs) officers the package was searched. he was shocked when the (customs) officers informed him that the package contained drugs. He informed the custom(s) officer that though he carried the black bag P11 nevertheless the package P5A was tucked in his underwear on the instruction of Ayub who not only did not inform him of the contents of P5A but also told him that it contained item(s) to evade customs duties. He denied admitting to Raja Aziz (SP9) that it contained drugs and he would not have carried it had he known that P5A contained drugs. He testified that he had related his testimony aforesaid to the investigating officer (SP10). He had also informed SP10 of the address of Ayub in Batam and that his wife could verify his employment with Ayub. Also he related to the investigating officer of the address of Zul and that initially the IO wanted to bring him to Kuala Lumpur to search for Zul but unfortunately the IO failed to bring him. He stated that he had no reason to doubt Ayub as he has been working for Ayub for quite sometime.

[18] And at pp 46–47 of the appeal record, His Lordship had this to say about the respondent's defence:

> In essence the defence of the accused is that he was an innocent carrier devoid of knowledge that the package P5A he carried by tucking under his trousers contained methamphetamine. In advancing his defence he alluded to the reason behind his carrying the package in the manner aforesaid in that it was to accommodate the request of his employer Ayub in Batam so as to evade payment of customs duties. His defence on oath alluded to the existence of his employer Ayub, Zul and Ramli Abo which he states was conveyed to the investigating officer (SP10) but who failed to investigate same.
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> Accused counsel strenuously urged that the three persons named above were not fictitious and was brought up at the stage of the prosecution's case and hence was not an afterthought but was never pursued for investigation by SP10. Hence a reasonable doubt has been successfully raised by the accused rebutting the presumption of trafficking under s 37(da) of the Act.
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> Upon evaluating the defence I cannot dismiss that Ayub, Zul and Ramli Abo was fictitious. The existence of Zul and his address in Kuala Lumpur and handphone number was conveyed to SP10 at the prosecution's stage and reaffirmed by the accused in his defence but SP10 failed to conduct an investigation.
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> On the existence of his employer Ayub again it was brought up at the prosecution's stage and reaffirmed by the accused through his defence that he had informed both SP9 and SP10 of the address of Ayub in Batam and that his wife Nuraini in Batam could confirm that he was working for Ayub and that Ramli Abo was also working for Ayub.
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> Upon evaluating the defence of the accused I am satisfied as to the existence of Ayub, Ramli Abo, Zul and the accused wife's Nuraini. The existence aforesaid was established through the sworn testimony of the accused and the failure of the investigating officer SP10 to conduct a full and through investigation.
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> The evidence of SP10 in cross-examination admitting that the accused did inform her that he was instructed by his employer Ayub to take the package and the khat from Zul in Kuala Lumpur is concretised by the accused's evidence on oath. Again the evidence of SP10 acknowledged that he did not trace nor (write) any letter to the accused's wife and did not contact the Batam Police or interpol to my mind upon evaluating same against the sworn testimony of the accused establishes that SP10 failed to make any attempt to trace the accused's wife and Ramli Abo, who could assist to verify the accused's testimony.
>
> In arriving at the finding that Ayub, Ramli Abo, Zul and Nuraini are not fictitious persons I have taken into consideration the accused reaction of not attempting to run upon being detained and co-operating with the Customs officers which is a strong inference of his lack of knowledge of the contents of the package P5A. Furthermore the investigation officer's (SP10) failure to investigate the address of Zul in Kuala Lumpur upon being informed by the accused and tracing the phone number of Zul from the handphone found on the accused and exhibited as P16 is supportive of the accused version that he was an innocent carrier.

> To my mind the accused defence that he was an innocent carrier could have been easily refuted by the prosecution had the prosecution procured and produced in court the record of the phone calls made from P16.
>
> The failure aforesaid has created a doubt in my mind that I cannot simply dismiss that the accused was not an innocent carrier in respect of the charge of trafficking which invaluably leads me to conclude that he has successfully refuted the presumption of trafficking under s 37(da) of the Act. Nevertheless as found by me earlier the accused was in actual possession of the drugs in question.

[19] Thus far we have seen that the learned High Court judge had rightly assessed the evidence and he too made an affirmative finding that since the package (exh P5A) was found on the person of the respondent (placed in front and underneath the underwear of the respondent), the respondent had physical custody and control of the drugs in question. Thereafter, His Lordship made an assessment as to whether the respondent had the requisite knowledge. And in this connection His Lordship rightly said that knowledge can be inferred and he cited the case of *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356 (HL), which held that there is no requirement in law that the prosecution must prove that the accused must know the exact drugs in question. Thereafter His Lordship based on the factual matrix of the case inferred that the respondent had knowledge of the drugs independent of the presumption under s 37(d) of the Act. Thus far, we categorically say that what His Lordship had done was right.

[20] It is a question of law as to what constitutes possession. And whether the offender is said to be in possession of a drug is a question of fact (*Pendakwa Raya v Kang Ho Soh* [1992] 1 MLJ 360, at p 371). Indeed in every trafficking case, possession is always an important ingredient. If there is direct evidence of possession, the prosecution will have a field day. But if there is no direct evidence of possession, then the prosecution will have to prove the ingredient of 'possession' and the trial judge must make an affirmative finding of 'possession' before the presumption of trafficking under s 37(da) of the Act can be invoked (*Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 (FC)).

[21] Many judges before us have attempted to define the elusive word 'possession'. In *Reg v Thomas Smith* (1855) 6 Cox CC 554, Chief Justice Erie described the word 'possession' as 'one of the most vague of all vague terms'. Taylor J in *Leow Nghee Lim v Reg* [1956] 2 MLJ 28, at p 30 aptly said:

> Probably the most helpful definition of possession is:
>
> The relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of other persons.

A This definition does not express, but it does imply that the meaning of the word includes some element of knowledge.

[22] Continuing at p 31 of the report, Taylor J had this to say:

B

> The word 'possession' is a vague and general word which cannot be closely defined. Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge.

C **[23]** In *Toh Ah Loh and Mak Thim v Rex* [1949] MLJ 54, the Court of Appeal sets out the three characteristics of possession, namely (a) the possessor must know the nature of the thing possessed; (b) that he must have the power of disposal over it; and (c) that he must be conscious of his possession of the thing in question.

D

[24] Lord Diplock in *Director of Public Prosecutions v Brooks* [1974] 2 All ER 840, in the context of s 7(c) of the Dangerous Drugs Law of Jamaica held that a person had possession of a dangerous drug, if, to his knowledge, he had the drug in his physical custody or under his physical control.

E

[25] In *Yee Ya Mang v Public Prosecutor* [1972] 1 MLJ 120, Sharma J defined the word 'possession' in this manner:

F

> The word 'possession' implies a physical capacity to deal with the thing as one likes to the exclusion of everyone and a determination to exercise that physical power on one's own behalf. It implies dominion and consciousness in the mind of the person having 'possession' that he not only has such dominion but also that he can exercise it.

G

[26] There are two ways to prove possession. One is by direct evidence. The other is by way of circumstantial evidence. And possession can also be proven with the aid of statutory presumption as set out in s 37(d) of the Act provided custody or control of anything whatsoever containing any dangerous drug is proven. The case of *Ho Seng Seng v Rex* [1951] MLJ 225, 226, discussed the meaning of 'custody' and 'control' in the context of s 37(d) of the Dangerous Drugs Ordinance 1951 which is similar to our 1952 Act. There Brown Ag CJ had this to say:

H

I

> I think that the element of knowledge is implicit in the word 'custody' and in the word 'control'. 'Custody' means watching over or keeping safe. You cannot watch over a thing or keep it safe unless you know it is there. Similarly you cannot have 'control' of a thing unless you know it is there. It follows that in the present case the onus was upon the prosecution to prove to the satisfaction of the court that the

appellant knew that a dangerous drug was in the basket. If they had proved that, then s 37(d) would have raised the presumption that the appellant was in possession of it and knew that it was opium.

[27] Again, as to what constitutes 'possession', we need to refer to the case of *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1, a decision of the Federal Court. There Arifin Zakaria FCJ (now Chief Justice of Malaysia) writing for the Federal Court referred to the case of *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237 in defining the word 'possession'. At pp 7–8 of the report, this was what His Lordship said:

In *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237 Thomson J dealt with the issue of possession under the Common Gaming Houses Ordinance 1953 and at p 239 he observed:

'Possession' itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed), at p 304:

A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi*. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shows such an intention. Or it must be clear that the circumstances in which it is found show such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the court that the person who is physically in a position to deal with the thing as his own had the intention of doing so.

And further down on the same page, he added:

A Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite.

It is trite that what constitutes 'possession' under s 37 of the Act is a question of law (see *Yee Ya Mang v Public Prosecutor* [1972] 1 MLJ 120 and *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585). It is however a question of fact whether in a given case a person can be said to be in possession of something.

[28] Abdul Aziz Mohamad JCA (later FCJ) in *Surentheran a/l Selvaraja v Public Prosecutor* [2006] 1 MLJ 641; [2005] 2 CLJ 264 speaking for the Court of Appeal had this to say at p 647(MLJ); p 269(CLJ) about possession:

There is, if at all, very seldom available direct proof of the knowledge that is necessary to constitute possession. In almost every case, proof of knowledge has to be by way of inference from the proven circumstances. One set of circumstances differs from another. In any given case, whether knowledge is inferable depends on the particular circumstances of the case and a proper appreciation of them. We have to look at the particular circumstances of this case and assess them independently, without being influenced by what may have been decided in some other case under a different set of circumstances.

[29] The issue of knowledge necessary to establish possession was also considered by Arifin Zakaria FCJ (now Chief Justice of Malaysia) in *Public Prosecutor v Abdul Rahman bin Akif* at pp 9–10 of the report:

In *Ramis all Muniandy v Public Prosecutor* [2001] 3 SLR 534, the Singapore Court of Appeal again propounded on the question of knowledge necessary to (establish) possession and at p 541 states:

Knowledge of drugs

The starting point in the consideration of this issue was that we had already concluded that the drugs was already on Ramis's motorcycle when he entered the vicinity and that he had physical control of the drugs. In the absence of any reasonable explanation by Ramis, these facts were sufficient to lead to a strong inference that Ramis knew that the bag found on his motorcycle contained drugs.

In *Tan Ah Tee*, Wee Chong Jin CJ, delivering the judgment of the court, said [1978–1979] SLR 211 at pp 217–218; [1980] 1 MLJ 49 at p 52):

Even if there were no statutory presumptions available to the prosecution, once the prosecution had proved the fact of physical control or possession of the plastic bag and the circumstances in which this was acquired by and remained with the second appellant, the trial judges would be justified in finding that she had possession of the contents of the plastic bag within the meaning of the Act unless she gave an explanation of the physical fact which the trial judges accepted or which raised a doubt in their minds that she had possession of the contents within the meaning of the Act.

The issue of knowledge neccessary to establish possession came to be considered by the English House of Lords in the case of *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356, which was considered and relied upon by the Singapore Court of Appeal in *Zulfikar bin Mustaffah v Public Prosecutor*. In Warner the following question was posed to Their Lordships:

Whether for the purpose of s 1 of the Drugs (Prevention of Misuse) Act 1964, a defendant is deemed to be in possession of a prohibited substance when to his knowledge he is in physical possession of the substance but is unaware of its true nature.

At p 367 Lord Reid addressed the issue as follows:

The object of this legislation is to penalise possession of certain drugs. So if mens rea has not been excluded what would be required would be the knowledge of the accused that he had prohibited drugs in his possession. It would be no defence, though it would be a mitigation, that he did not intend that they should be used improperly. And it is common place that, if the accused had a suspicion but deliberately shut his eyes, the court or jury is well entitled to hold him guilty. Further, it would be pedantic to hold that it must be shown that the accused knew precisely which drug he had in his possession. Ignorance of the law is no defence and in fact virtually everyone knows that there are prohibited drugs. So it would be quite sufficient to prove facte from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession. That would not lead to an unreasonable result.

In the same case Lord Morris answered the question in (the) following manner:

If there is assent to the control of a thing, either after having the means of knowledge of what the thing is or contains or being unmindful whether there are means of knowledge or not, then ordinarily there will be possession. If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains then, ordinarily, I would suppose that there would not be possession. If, however, someone deliberately assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he had made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them.

[30] Reverting back to the instant appeal, the learned High Court judge rightly decided at p 44 of the appeal record that since the dangerous drugs weighed 284.23g of methamphetamine, the presumption of trafficking under s 37(da) of the Act was triggered and called upon the respondent to enter his defence for the trafficking charge.

[31] But, after having called the respondent to enter his defence for the

A trafficking charge, the learned High Court judge went against his earlier decision that the respondent had knowledge of the dangerous drugs and found the respondent guilty for possession of the dangerous drugs punishable under s 39A(2) of the Act. It is our judgment that the learned High Court judge erred in law and on the facts. We are dealing with the case of mens rea possession and not passive possession because the dangerous drugs were found on the person of the respondent. What Lord Reid said in *Warner v Metropolitan Police Commissioner*, at p 367, bears repetition and should be vigorously applied here:

> The object of this legislation is to penalise possession of certain drugs. So if mens rea has not been excluded what would be required would be the knowledge of the accused that he had prohibited drugs in his possession. It would be no defence, though it would be a mitigation, that he did not intend that they should be used improperly. And it is a commonplace that, if the accused had a suspicion but deliberately shut his eyes, the court or jury is well entitled to hold him guilty. Further, it would be pedantic to hold that it must be shown that the accused knew precisely which drug he had in his possession. Ignorance of the law is no defence and in fact virtually everyone knows that there are prohibited drugs. So it would be quite sufficient to prove facts from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession. That would not lead to an unreasonable result.

[32] In *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2001] 1 CLJ 381, it was established by the evidence led and accepted by the learned trial judge that the dangerous drugs in question were found in packets within the stomachs of the appellants. Each appellant had swallowed a packet containing the drug. Gopal Sri Ram JCA writing for the Federal Court at pp 255-256(MLJ); p 388 (CLJ) aptly said:

> The learned trial judge found the appellants' version of how they had come to swallow the drugs in question as being implausible. The totality of the evidence reasonably supports the conclusion that the appellants were in actual possession of the prescribed drug at the time of their initial detention.

[33] The above quoted passage from the judgment of Gopal Sri Ram JCA writing for the Federal Court concerned knowledge having been established based on inferences drawn from proved facts and not direct evidence.

[34] In order to establish whether there is intention or knowledge, it is always pertinent to infer from the proved facts and the circumstances thereto. Thomson J in *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237 at p 239, worded it nicely in these salient words:

Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.

[35] Shaik Daud JCA in *Wong Nam Loi v Public Prosecutor* [1997] 3 MLJ 795, at p 798 had this to say about knowledge:

In most cases, knowledge cannot be adduced by direct or tangible evidence but only by inference from the surrounding circumstances.

[36] Still on knowledge, reference should be made to the case of *Neo Koon Cheo v Reg* [1959] MLJ 47. In that case, there was a raid conducted by a detective sergeant, a detective corporal and a detective on the attic of premises No 26, New Bridge Road on 21 January 1958 at about 8.20pm. On entering the attic, the detective corporal and the detective saw the appellant holding a confectionery tin in his hands and attempting to get out of the attic through an opening on the left side of the attic. On examination the tin was found to contain a phial of *chandu*, a small tin of *chandu* dross, an opium pipe-head, a rag and some tools. In holding by way of an alternative that the evidence was sufficient to make out a case against the appellant for possession of the prepared opium and the smoking utensils, Ambrose J, had this to say at p 50:

If my interpretation of s 37(d) of the Ordinance is not correct, the conviction on the first charge can be supported without having recourse to the presumption under s 37(d). The fact that the appellant was seen attempting to take the confectionery tin and its contents out of the attic as soon as the detectives entered the attic raises the inference that the appellant was endeavouring to put the tin and its contents out of sight and the further inference that he had knowledge of the nature of the contents of the tin. As the opium pipe — head and the *chandu* and *chandu* dross were found in the attic it must be presumed, until the contrary is proved, under s 37(c) of the Dangerous Drugs Ordinance that the attic was used for the purpose of smoking of *chandu* by a human being and that the occupier permitted the attic to be used for such purpose. The appellant was not the occupier of the premises but a friend of the occupier. Nevertheless the presumption under s 37(c) makes both the inferences irresistible. As the contents of the confectionery tin were in the appellant's actual physical control, and as the circumstances justified the inference that the appellant intended to exercise control over them for his own purposes, he was, in my opinion, rightly found to be in possession of the *chandu* and *chandu* dross.

[37] Factually speaking, the respondent was one of the ferry passengers at the zone. If not for the alertness of SP5, the respondent would have escaped detection. When SP5 was inspecting the goods carried by the respondent, SP5 noticed that the respondent was acting rather suspiciously and in a state of uneasiness and this prompted SP5 to direct the respondent to proceed to the customs inspection room for a thorough examination.

[38] In the inspection room, the respondent was asked to open his jacket and his trousers. The respondent complied and SP5 saw a package (exh P5A) placed at the front part of the respondent's underwear. SP4 confirmed that the package (exh P5A) contained the dangerous drugs as per the charge. That would certainly be mens rea possession and the learned High Court judge inferred from these facts that the respondent had knowledge of the drugs independent of the presumption under s 37(d) of the Act. And because the weight of the dangerous drugs, to wit, methamphetamine was 284.23g, His Lordship invoked the presumption of trafficking under s 37(da)(iii) (it should be s 37(da)(xvi) of the Act). It must be borne in mind that the respondent held the dangerous drugs from Kuala Lumpur to Johor Bahru — a journey of approximately six hours. In our judgment, the defence was totally unreasonable and it did not rebut the presumption of trafficking on the balance of probabilities. We categorically say that a reasonable tribunal armed with the same facts and properly directing itself would have convicted the respondent for trafficking in the dangerous drugs.

[39] We will now consider grounds two and three of the petition of appeal together. In regard to ground two of the petition of appeal, learned counsel for the respondent submitted that the learned High Court judge was satisfied that the respondent was an 'innocent carrier' and he drew our attention to two passages found in the judgment of the learned High Court judge at p 47 which were worded as follows:

> To my mind the accused defence that he was an innocent carrier could have been easily refuted by the prosecution had the prosecution procured and produced in court the record of the phone calls made from P16.
>
> The failure aforesaid has created a doubt in my mind that I cannot simply dismiss that the accused was not an innocent carrier in respect of the charge of trafficking which (invariably) leads me to conclude that he has successfully refuted the presumption of trafficking under s 37(da) of the Act. Nevertheless as found by me earlier the accused was in actual possession of the drugs in question.

[40] Now, the issue of an 'innocent carrier' must necessarily relate to the fact that the respondent claimed that he has no knowledge about the contents of the package (exh P5A). But the surrounding facts as alluded to earlier showed that the respondent knew that the package (exh P5A) contained drugs. We must highlight the fact that SP5 noticed that the respondent acted suspiciously and was in a state of uneasiness. This was the conduct of the respondent and it is certainly relevant under ss 8(2) and 9 of the Evidence Act 1950 (Act 56) and the respondent must explain why he was behaving in that way (*Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717 (FC)). Unfortunately, no explanation was forthcoming from the respondent. In our judgment, there is a nexus between the conduct of the respondent and the offence in question.

[41] In *Prakash Chand v State (Delhi Admn)* AIR 1979 SC 400, at p 404, Chinnappa Reddy J had this to say about conduct:

> On the other hand in *Zwinglee Ariel v State of Madh Pra* (AIR 1954 SC 15), this court appeared to be inclined to hold that evidence to the effect that the accused started trembling and showed signs of being frightened on being questioned by the Police officer, if proved, was admissible; and, in *Rao Shiv Bahadur Singh v State of Vindh Pra* (AIR 1954 SC 322), and State of *Madras v A Vaidyanatha Iyer* (AIR 1958 SC 61), this court actually relied on evidence relating to the conduct of the accused on being confronted by the police officer with the allegation that he had received a bribe. In *Rao Shiv Bahadur Singh*'s case the evidence relating to conduct on which reliance was placed was to the effect that the accused was confused and could furnish no explanation when questioned by the Police officer. In *Vaidyanatha Iyer*'s case also evidence to the effect that the accused was seen trembling and that he silently produced the notes from the folds of his dhoti was acted upon.

[42] Still on the issue of conduct, we need to refer to the case of *Teh Hock Leong v Public Prosecutor* [2010] 1 MLJ 741, a decision of James Foong FCJ. In a well written judgment, His Lordship writing for the Federal Court had this to say about contemporaneous conduct at p 745 of the report:

> First, he contended that the High Court and the Court of Appeal had failed to consider the contemporaneous conduct of the appellant in not trying to escape or putting up a struggle with the police when confronted by PW5 and his men or attempting to disassociate or discard the backpack containing the dangerous drugs. Such conduct, if considered by the courts below, could infer that the appellant had no knowledge of the said drugs in the backpack.
>
> It is our view that in order to draw a favourable inference from the appellant's contemporaneous conduct, his action or inaction must be examined in the light of the situation at the material time. The area where the appellant was confronted by PW5 was the arrival gate of an incoming flight in the KLIA. This was the only exit point where passengers disembarking the plane can enter the KLIA terminal. It is common knowledge that the area was tight and restricted with hardly any room for the appellant to make a successful escape even if he had tried. From here the appellant was then taken by PW5 and his men to PW5's office in the KLIA. The approximate walking distance was 600–800 metres. Here again the appellant's chances of a quick getaway were minimal since he was escorted and was within the restricted vicinity of the KLIA building. And, if the appellant were to attempt to throw away or disassociate himself with the backpack during this entire duration described it would evidently be noticeable. Of course, since the drugs were so cunningly concealed, there could be no necessity to take such drastic actions which may attract instant suspicion. So against these circumstances, the appellant's docile conduct throughout the period described could not have inferred an absence of knowledge of the said drugs. For this reason there is no misdirection by the courts below.

[43] Here, we are dealing with a package (exh P5A) containing the

dangerous drugs which was placed at the front part of the respondent's underwear. According to SP5, it protruded out. And when SP9 nonchalantly asked the respondent what the package was, the respondent answered spontaneously 'dadah'. Any reasonable man carrying the dangerous drugs like what the respondent did must know and should have known what he was carrying. The response of the respondent to the query by SP9 showed that the respondent knew what he was carrying.

[44] Knowledge is a mental element and it is one of the pre-requisites of possession. The respondent, by virtue of the package (exh P5A) being placed at the front part of his underwear, must surely have custody and control of the contents of the package (exh P5A). Adopting the words of Brown Ag CJ in *Ho Seng Seng v Rex* [1951] MLJ 225, the respondent here knew that the drugs were placed at the front part of his underwear and he had custody of the drugs since he was 'watching or keeping it safe there' and he too had control over the drugs because he knew that the drugs were there. The respondent had dominion over the drugs and had knowledge of its whereabouts and had easy access to it and could at any opportune time obtained possession of it and, consequently, had the capacity to direct its disposal. To put it bluntly, the respondent had exclusive possession of the dangerous drugs (*Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137 (SC); *Saludin bin Surif v Public Prosecutor* [1997] 3 MLJ 317 (CA); *Public Prosecutor v Chow Kam Meng* [2001] 7 CLJ 387; *Shamsuddin bin Hassan & Anor v Public Prosecutor* [1991] 3 MLJ 314 (SC); *Lee Chee Meng v Public Prosecutor* [1992] 1 MLJ 322; [1992] 1 CLJ (Rep) 168 (SC); *Public Prosecutor v Mohamad Fairus bin Omar* [1998] 5 MLJ 729; *Gooi Loo Seng v Public Prosecutor* [1993] 3 MLJ 137; [1993] 2 AMR 1135; (SC); and *Choo Yoke Choy v Public Prosecutor* [1992] 2 MLJ 632; [1992] 1 CLJ (Rep) 43).

[45] In his defence, taken on oath at the witness box, the respondent — an Indonesian from Batam with an address in Batam as reflected in the search list in exh P20, testified that he was married and had a wife by the name of Nuraini. The respondent testified in examination-in-chief as follows:

(a) that he arrived in Malaysia on 18.5.2005;

(b) that he worked in a provision shop in Batam with an employer by the name of Ayub;

(c) that Ayub directed him to go to Malaysia to collect calligraphy written in jawi scripts as shown in photographs at pages 71 to 72 of the appeal record from Zul;

(d) that Ayub also directed him to collect a package (exhibit P5A) from Zul;

(e) that on 18.5.2005 at 6.00 p.m. he arrived at the Stulang Laut Terminal Ferry;

(f) then he took a taxi to the Larkin bus station and from there he took a bus to

Kuala Lumpur and arrived at 12.00 midnight and he proceeded straight to a flat located in front of Safuan Plaza Chow Kit and slept there with a friend by the name of Herman;

(g) that on 19.5.2005 he went sight seeing in Kuala Lumpur;

(h) that on 21.5.2005 he met Zul in the vicinity of Chow Kit;

(i) that he contacted Zul using the telephone number given to him by Ayub by using his own handphone and he could not remember the telephone number of Zul because the incident happened some time ago;

(j) that Zul handed to him one calligraphic writing and one package; and Zul told him to take good care of them;

(k) that he took a taxi to Puduraya and arrived there at 11.00 p.m. (night);

(l) that he arrived at Johor Bahru on 22.5.2005 at 5.00 a.m. in the morning;

(m) that he sat at the coffee shop at Larkin on 22.5.2005 between 5.00 a.m. till 6.00 a.m.;

(n) that he took a taxi to the ferry terminal at Stulang Laut on 22.5.2005 at 6.00 a.m. and, on arrival, he bought a ticket;

(o) he then proceeded to the immigration counter at Stulang Laut to have his passport chopped;

(p) he then proceeded to the customs counter where one customs officer checked the goods carried by him and also checked him physically;

(q) he said that the goods that he carried comprised of one black bag and one calligraphy;

(r) that when the customs officer examined him physically, the customs officer took from inside his underwear at the front part one package;

(s) the customs officer directed him to take out the package as per the photograph marked as exhibit P8(2) and the package already marked by the court as exhibit P5A;

(t) that he took out the package (exhibit P5A) from the front part of his underwear and the customs checked it after the arrival of a few customs officers and these customs officers were the ones who gave evidence in court;

(u) that the customs officers opened the package (exhibit P5A) and said 'dadah' and he said that he was shocked on hearing that the package (exhibit P5A) contained 'dadah';

(v) he said that he put the package (exhibit P5A) inside his underwear on the direction of Ayub even though he carried a bag;

(w) he further said that he put the package (exhibit P5A) inside his underwear because Ayub told him that the package was valuable and should evade from paying customs duties;

(x) but he said that Ayub did not tell him about the contents of the package (exhibit P5A);

A (y) he said that he was not brave enough to open the package (exhibit P5A) because the package (exhibit P5A) did not belong to him; and

(z) he said that he followed the instructions of Ayub because he has worked for Ayub as an assistant sale personnel in Ayub's provision shop for a long time.

B

[46] Continuing with his examination-in-chief, the respondent had this to say:

(a) he agreed that SP9 was the senior customs officer that came to the customs C counter;

(b) he said that he did not admit to anything before SP9;

(c) he said that he told SP9 that 'saya tidak tahu ini barang dadah';

(d) he said that he told SP9 that 'ini barang Ayub suruh ambil daripada Zul'; D

(e) he said that SP9 did not ask him as to why he kept the package (exhibit P5A) inside his underwear;

(f) he said that he did not know the contents of the package (exhibit P5A);

(g) he said that if he knew the contents of the package (exhibit P5A) contained E dangerous drugs, he would not have carried it;

(h) he said that he knew that in Malaysia if convicted for trafficking in dangerous drugs the sentence would be death;

(i) he then said that he was taken to the lock up at Tampoi and he was questioned F by SP10 and he narrated to SP10 the same thing like what he told the court;

(j) that he gave Ayub's address to SP10;

(k) that his wife knew where he was working;

(l) that the drugs tucked inside the front part of his underwear does not belong to G him;

(m) that besides him working for Ayub there was another employee by the name of Ramli Abo;

(n) that the 'kartu penduduk' listed in the search list marked as exhibit P14 showed H the name of Ramli Abo on it;

(o) that his wife also knew about Ramli Abo and that his wife could also show where he was working;

(p) he said that he knew the address of Zul in Kuala Lumpur and that he has I informed SP10 about Zul's address;

(q) that the investigating officer (SP10) did not bring him to Kuala Lumpur to look for Zul even though SP10 told him that SP10 would do so;

(r) that he agreed that he would be able to locate Zul if SP10 were to bring him to Kuala Lumpur;

(s) that Ayub did not pay him double for bringing the goods which Ayub directed him to do and he did not suspect Ayub because he has been working for Ayub for a long time; and finally

(t) he said that he had informed the customs officer (SP5) that detained him the same thing which he told the court.

[47] Under cross-examination, the respondent testified as follows:

(a) that before 18.5.2005 he used to go to Malaysia;

(b) he agreed that previously he had entered Malaysia on countless occasions and that each time he entered Malaysia it would be via the terminal ferry at Stulang Laut;

(c) he agreed that he entered Malaysia to buy goods for Ayub and he used to buy rice for Ayub;

(d) he has worked for Ayub since the year 2000 and that Ayub sell provisions like sugar, rice and cooking oil;

(e) he agreed that Ayub does not sell calligraphy;

(f) he agreed that the black bag (exhibit P11) was brought by him from Batam to Kuala Lumpur and back;

(g) he agreed that the black bag (exhibit P11) had enough space to carry a lot of things and he agreed that he put his clothes inside the black bag;

(h) he cannot remember the fare for the ferry from Batam to Stulang Laut;

(i) he too cannot remember the taxi fare from Stulang Laut to Larkin;

(j) he also cannot remember the bus fare from Larkin to Kuala Lumpur;

(k) even from Puduraya to Chow Kit, he could not remember the taxi fare;

(l) between 18.5.2005 to 22.5.2005 he went sight seeing around the vicinity of Chow Kit and he did not buy any goods;

(m) again he could not remember the bus and taxi fares from Kuala Lumpur to the ferry terminal at Stulang Laut;

(n) he agreed that money is needed to travel from Batam to Kuala Lumpur and back and he said that Ayub would give him the money for his trip to Malaysia and for expenses;

(o) he said that each time he goes to Malaysia Ayub would give him RM1,000.00;

(p) he agreed that the package (exhibit P5A) was found on his person;

(q) he disagreed that the package (exhibit P5A) was not big;

(r) he disagreed that since the package (exhibit P5A) was big, it should be kept in the black bag;

(s) he agreed that the package (exhibit P5A) was put inside his underwear;

(t) he said that he did not purchase the calligraphy and that it was Zul who purchased the calligraphy but he did not know where Zul purchased it from;

(u) he agreed that he carried the calligraphy (exhibit P12) from Kuala Lumpur to Johor Bahru on the instruction of Ayub;

(v) he disagreed that it was not Ayub who asked him to carry the calligraphy;

(w) he agreed that on this occasion he did not buy any rice or other provision items for Ayub;

(x) he said that he met Zul on the night of 21.5.2005 and that he met Zul only once and he did not speak to Zul;

(y) that Zul handed him one calligraphy and one package (exhibit P5A) to be handed to Ayub; and

(z) he did not ask Zul about the package (exhibit P5A) that was handed to him by Zul.

[48] Continuing with his cross-examination, the respondent testified as follows:

(a) he did not agree that he met Zul before 21.5.2005;

(b) he did not agree that Zul had asked him about the drugs;

(c) he did not agree that Ayub gave him RM21,000.00;

(d) he did not agree that out of the sum of RM21,000.00, RM1,000.00 was for him and RM20,000.00 was meant for Zul;

(e) he did not agree that he gave Zul RM20,000.00 after Zul handed to him the package (exhibit P5A);

(f) he said that he did not know the address of Zul but he knew where Zul stayed;

(g) he admitted telephoning Zul on his handphone but he cannot remember Zul's telephone number;

(h) he said that he gave Zul's telephone number to the investigating officer SP10;

(i) he disagreed that he did not give Zul's telephone number to SP10;

(j) he disagreed that he did not give Zul's house address to SP10;

(k) he agreed that the 'kartu penduduk Ramli Abo' was with him when he was arrested;

(l) he said that Ramli Abo asked him to extend the validity of Ramli Abo's 'kartu perjalanan' because its validity was supposed to end on 31.12.2005;

(m) he said that when Zul handed to him the package (exhibit P5A), he did not ask Zul about anything;

(n) he disagreed that he knew the package (exhibit P5A) to contain drugs;

(o) he disagreed that he knew the package (exhibit P5A) to contain drugs just because he put it inside his underwear;

(p) that on 22.5.2005 at 7.00 a.m., he arrived at the Stulang Laut ferry terminal;

(q) he agreed that he purchased a ticket to go back to Batam using the first ferry but he did not know what time it would depart;

(r) he said that when he arrived at the Stulang Laut ferry terminal, the package (exhibit P5A) was with him and he put the said package in his underwear;

(s) he agreed that one customs officer examined him;

(t) he agreed that bodily search was conducted on him at the customs inspection room

(u) he agreed that three customs officers SP5, SP6 and SP7 were with him in the inspection room;

(v) he disagreed that all three customs officers SP5, SP6 and SP7 saw him took out the package (exhibit P5A) from his underwear;

(w) he agreed that after he took out the package (exhibit P5A) from his underwear it was placed on the table as reflected in the photographs at P8(3) and P8(4);

(x) he said that it was SP9 who opened the package (exhibit P5A);

(y) he disagreed that he uttered the word 'dadah' when SP9 opened the package (exhibit P5A); and

(z) he disagreed that he was not surprised when the package (exhibit P5A) was opened.

[49] Again, continuing with his cross-examination, the respondent had this to say:

(a) when shown moneys in Malaysian and Rupiah currencies — RM424.00 and Rupiah 55100, he disagreed that these sums were significant;

(b) he said that these moneys were part of the moneys that were given to him by Ayub;

(c) he disagreed that these were part of the moneys that were used to purchase the drugs;

(d) he disagreed that he did not give the particulars of Ayub to SP10;

(e) he disagreed that he was paid by Ayub to carry the drugs;

(f) he disagreed that he did not give the full particulars of Ayub and Zul to the customs; and

(g) he disagreed that the customs could not trace Ayub and Zul because he failed to give their full particulars.

[50] In re-examination, the respondent testified as follows:

(a) before the incident he had never put any item inside his underwear before leaving Malaysia;

A (b) he said that Ayub is a muslim and that was why Ayub asked him to collect the calligraphy;

(c) he could not remember the bus fare and the taxi fare because it happened a long time ago;

B (d) he did not know why this time Ayub did not ask him to buy rice;

(e) in regard to Ramli Abo's 'kartu perjalanan', he was supposed to extend its validity and that was the reason that it has to be registered;

(f) he said that when he was taken to the customs inspection room SP9 has not turned up yet and that the package (exhibit P5A) was opened before the arrival C of SP9;

(g) he said that RM424.00 and Rupiah 55100.00 were negligible sums and it was only sufficient to pay for the ferry ride; and

(h) he said that RM1,000.00 given to him by Ayub were sufficient for him to travel to Malaysia and back to Batam.

D

[51] It must be noted that on 21 May 2005, Zul handed to the respondent one calligraphy and one package (exh P5A) and Zul told the respondent to take good care of them. On 21 May 2005 at 11pm (night), the respondent took a E bus from Puduraya and he arrived in Johor Bahru on 22 May 2005 at 5am in the morning carrying with him one calligraphy and one package (exh P5A). Upon arrival in Johor Bahru on 22 May 2005, the respondent proceeded to the coffeeshop at Larkin and he was there from 5am–6am and he was still carrying with him one calligraphy and one package (exh P5A). On 22 May 2005 at F 7.45am (as per the charge), the respondent was arrested carrying with him a black bag (exh P11), and one calligraphy. And at the time of the respondent's arrest, one package (exh P5A) was found tucked in the front part of the respondent's underwear. Evidence showed that that package (exh P5A) contained the dangerous drugs as per the charge. Now, it can be surmised that G the respondent held onto the package (exh P5A) containing the dangerous drugs for about nine long hours (to be precise eight hours 45 minutes) calculated from 21 May 2005 at 11pm (night) to 22 May 2005 at 7.45am, yet the respondent said:

H (a) that he was not brave enough to open the package (exhibit P5A) because the package (exhibit P5A) did not belong to him;

(b) that he did not know the contents of the package (exhibit P5A); and

(c) that he did not ask Zul about the package (exhibit P5A) that was handed to him by Zul.

I

[52] Although learned counsel for the respondent did not submit on the issue of wilful blindness, it is quite apparent that the defence of the respondent proceeded along that line. Indeed, the learned deputy public prosecutor drew our attention to the case of *Public Prosecutor v Tan Kok An* [1992] 1 MLJ 89; [1996] 2 CLJ 96, and he submitted that that case made reference to the concept of wilful blindness. At p 101 (MLJ); pp 105–107 (CLJ) of the case of *Public Prosecutor v Tan Kok An*, the learned High Court judge had this to say:

> Here, the accused pointed the blame to Gay Au and he said that he was framed and deceived by Gay Au into believing that what he carried was money. This brings me to an interesting concept of wilful blindness as alluded to by Yong Pung How CJ (Singapore) in *Public Prosecutor v Hia Win* [1995] 2 SLR 424 where His Lordship in a dissenting judgment had this to say:
>
> It must be appreciated that the concept of wilful blindness qualifies the requirement of knowledge (see *R v Griffiths* (1974) 60 Cr App R 14). As Professor Glanville Williams aptly remarked in his Textbook on *Criminal Law*, at p 125:
>
> … the strict requirement of knowledge is qualified by the doctrine of wilful blindness. This is meant to deal with those whose philosphy is: 'Where ignorance is bliss, 'tis folly to be wise'. To argue away inconvenient truths is a human failing. If a person deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know,' he is taken to know.
>
> In another part of the same judgment, His Lordship Yong Pung How CJ (Singapore) observed:
>
> At this juncture, I emphasise that where the accused, who is not an innocent custodian in the sense that the drugs were planted in his bag without his being aware of them, accepted the goods in circumstances which rendered the taking of the precaution of satisfying himself that the goods were what they purported to be and were not drugs an imperative, then, if he did not take the trouble to inspect them, but merely relied on another person's assurance, he would not rebut the statutory presumption of knowledge. In fact, he would be guilty of wilful blindness to the obvious truth of the matter.
>
> In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.
>
> It is pertinent to note that in *Public Prosecutor v Hia Win*, the respondent there was acquitted of the charge of importing into Singapore 3,468g of diamorphine. The prosecution had appealed against the acquittal and the majority decision of the Singapore Court of Appeal upheld the acquittal and dismissed the appeal. LP Thean JA speaking for the majority, inter alia, had this to say (see the headnote at p 425):

It was for the respondent to rebut the statutory presumptions of possession of the drugs and knowledge of the nature of the drugs. It was a difficult task in the circumstances because the respondent had the mens rea to smuggle gems and knew of the illicit nature of the content of the bag. Furthermore, the defence put forth by the respondent was one commonly used by drug couriers. However, it was not the law that by reason of the respondent's knowledge of the illicit nature of the contents of his bag, his evidence that he did not know that the contents were drugs could not and should never be believed. Such knowledge only rendered it more difficult for the court to believe his evidence. Very much depended on the circumstances of the case.

Here, the accused knew that he was delivering some money in the plastic bag to Lim. There was nothing illicit, in the context of this case, for the accused to carry that money in the plastic bag for delivery to Lim. This is the distinguishing feature between this case and that of *Public Prosecutor v Hia Win*. It is therefore far easier for this court to hold, as what was alleged by the accused, that he did not know that the contents of the plastic bag were drugs for, after all, he had accompanied on two previous occasions Gay Au to Lim's house for the purpose of sending money and not drugs there.

[53] Continuing at the same page, the learned High Court judge in *Public Prosecutor v Tan Kok An* in serious vein said:

The time has come to apply rigorously the doctrine of wilful blindness when one considers the question of knowledge. In the Malaysian context it is courteous to carry goods on behalf of one's friend to a third party. It is certainly discourteous to open those goods to see its contents before sending it to a third party. That would be the courteous behaviour of right thinking Malaysians. But I hasten to add, lest I be accused of opening the floodgate, that to apply the doctrine of wilful blindness successfully to any particular case would be solely dependent on the relevant inferences to be drawn by the trial judge from all the facts and circumstances of the particular case, giving due weight, where necessary, to the credibility of the witnesses. Where the case for the prosecution is water tight, the doctrine of wilful blindness should fail. As Lordship Justice James said in *R v Griffiths*:

Further, although the direction at p 10 could have been better expressed than in the words 'a man in law in those circumstances knows or believes,' we are satisfied that the direction read in its entirety is that the jury had to be satisfied of either knowledge or belief and that one approach to that issue on the facts was to decide whether the appellant suspected the candlesticks were stolen and adopted an attitude of wilful blindness to the circumstances of receipt. We, therefore, conclude, after some doubt, that there was no misdirection and that the appeal fails on this point as it does upon the first point tabled. We would add that had we decided that there was in this respect a misdirection, we would have had no hesitation in applying the proviso. The evidence was overwhelming and no reasonable jury on this evidence could have arrived at a conclusion other than that the appellant believed the goods were stolen.

[54] Factually speaking, the facts in *Public Prosecutor v Tan Kok An* are poles apart from the facts in the present appeal. There, the accused had on two previous occasions accompanied Gay Au to Lim's house for the purpose of sending money. So, on that fateful day when Gay Au requested the accused to send some money to Lim, and this was overheard by Michael, the accused did not suspect anything fishy and to the accused it was just another assignment to send the money to Lim. But in our present appeal, the respondent testified that he used to enter Malaysia to buy rice for Ayub and the respondent under re-examination said that he did not know why this time (meaning on that fateful day) Ayub did not ask him to buy rice. Instead when the respondent entered Malaysia on 18 May 2005, he was directed by Ayub to do so. And the purpose was, firstly, to collect the calligraphy from Zul and, secondly, to collect a package (exh P5A) from Zul. And when Zul handed these two items to the respondent, the respondent was advised by Zul to take good care of them. The respondent testified that he put the package (exh P5A) inside his underwear because Ayub told the respondent that the package (exh P5A) was valuable and should evade from paying customs duties. The respondent also testified that Ayub did not tell him about the contents of the package (exh P5A). The respondent testified further that he followed the instructions of Ayub because he has worked for Ayub as an assistant sale personnel in Ayub's provision shop since the year 2000.

[55] We cannot simply apply the concept of 'wilful blindness' blindly to all cases. The caveat placed by the learned High Court judge in *Public Prosecutor v Tan Kok An* at p 102 (MLJ); p 107(CLJ) to the effect 'that to apply the doctrine of wilful blindness successfully to any particular case would be solely dependent on the relevant inferences to be drawn by the trial judge from all the facts and circumstances of the particular case, giving due weight, where necessary, to the credibility of the witnesses' must be accepted as good law. Here, in the instant appeal, the learned High Court judge did not at all consider that the respondent had about nine long hours (to be precise eight hours 45 minutes) from the moment the respondent received the package (exh P5A) from Zul to ascertain by opening the package (exh P5A) himself to see its contents. Surely he must have suspected that something was amiss because he himself said that this time around Ayub did not ask him to buy rice in Malaysia which Ayub normally did. Again, the respondent should also be more alert bearing in mind that the calligraphy which Ayub asked him to collect from Zul was not even sold in Ayub's provision shop. And the respondent should also be put on alert when Zul advised him to take good care of the package (exh P5A) and the calligraphy. And when Ayub told the respondent that the package (exh P5A) was valuable and the respondent should evade from paying customs duties, that should alert any reasonable man to be more careful and to open the package (exh P5A) and ascertain its contents. In our judgment, from the tenor of the evidence of SP5, the respondent knew that the package (exh P5A) contained dangerous drugs and that was why he acted suspiciously and was

seen to be in a state of uneasiness (*Prakash Chand v State (Delhi Admn)*). And when asked by SP9 as to the contents of the package (exh P5A), the respondent responded spontaneously by saying 'dadah'. This damning pieces of evidence cannot just be swept under the carpet and ignored by us. The respondent himself admitted that when he arrived at the Stulang Laut ferry terminal, the package (exh P5A) was with him and he put the said package in his underwear notwithstanding the fact that the black bag (exh P11) which the respondent carried had enough space to accomodate the said package. If the package (exh P5A) was an 'innocent item', there was no reason not to put the said package in the black bag (exh P11). In our judgment, the respondent knew that the package (exh PSA) contained dangerous drugs and that was the reason as to why he put the said package inside his underwear.

[56] The learned High Court judge considered the respondent's reaction of not attempting to run upon being detained and co-operating with the customs officers as a strong inference of the respondent's lack of knowledge in regard to the contents of the package (exh P5A). Just like the case of *Teh Hock Leong v Public Prosecutor* [2010] 1 MLJ 741, the opportunity to escape was practically nil. Looking at the sketch plan marked as 'exh P13' as seen at p 81 of the appeal record, the customs counter was located quite near the immigration check point. Any attempt to run away would surely be futile. And when the respondent was brought to the customs inspection room, his chances of escaping successfully were nipped in the bud, if he ever attempted to do so. Adopting the words of James Foong FCJ in *Teh Hock Leong v Public Prosecutor* [2010] 1 MLJ 741, at p 745, the respondent's 'docile conduct during the period described could not have inferred an absence of knowledge of the said drugs'. But even though the respondent was docile, so to speak, he was seen to have acted suspiciously and was in a state of uneasiness and his admission to SP9 that the contents of the package (exh P5A) were drugs was incriminating. Such conduct must be considered in its correct perspective and when so considered they point to the guilt of the respondent.

[57] In regard to ground three of the petition of appeal, the learned High Court judge erred in law and on the facts when His Lordship held that the failure of the prosecution to tender the record of the number of telephone calls made from the handphone ('exh P16A') of the respondent in order to trace the telephone number of Zul together with the failure of the prosecution to investigate as to the existence of Ayub, Zul and Ramli Abo further strengthened the respondent's defence of being an 'innocent carrier'. But we must take heed of what Lord Morris of Borth-y-Gest said in *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356 at pp 375–376:

> If, however, someone deliberately assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents. I

cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he had made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them.

[58] The above passage when read in the context of the respondent putting the package (exh P5A) containing the dangerous drugs in his underwear makes the culpability of the respondent more pronounced. It makes not a whit of a difference that Ayub asked the respondent to collect the package (exh P5A) from Zul in Kuala Lumpur. At the time of arrest, it was the respondent who was in possession of the package (exh P5A) containing the dangerous drugs when the respondent put the said package in the front part of his underwear. And by virtue of s 37(da)(xvi) of the Act, the respondent was trafficking the dangerous drugs, to wit, methamphetamine weighing 284.23g as per the charge.

[59] In regard to Ayub, Zul, Ramli Abo and the respondent's wife, they were not with the respondent when the respondent was arrested. From Batam to Kuala Lumpur, the respondent travelled alone. From Kuala Lumpur to Johor Bahru, the respondent also travelled alone and when caught the respondent had the dangerous drugs placed in the package (exh P5A) nicely tucked in the front part of his underwear in order to avoid detection. If it was not for SP5, the dangerous drugs would have gone to Batam. All these salient facts were not highlighted by the learned High Court judge.

[60] From the treatment of the evidence as set out somewhere in this judgment, the respondent has the requisite knowledge and he too had the exclusive possession of the dangerous drugs. The evidence is overwhelming. The respondent is a drug trafficker.

[61] At the worst case scenario, even if Ayub and Zul are not fictitious characters, can the respondent get away from the charge just because the prosecution failed to trace them? It would be perverse in the extreme if the respondent could get off scot free.

[62] We must look at the evidence critically. The learned High Court judge held that the respondent had knowledge of the drugs independently of the presumption under s 37(d) of the Act. And His Lordship also invoked the presumption of trafficking under s 37(da)(xvi) of the Act because of the weight of the methamphetamine. This was at the close of the prosecution's case where His Lordship held that the prosecution had succeeded in establishing a prima facie case of trafficking in the dangerous drugs and he called the defence of the respondent accordingly.

[63] In *Balanchandran v Public Prosecutor* [2005] 2 MLJ 301, Augustine Paul JCA (later FCJ) formulated the test of a prima facie case in this way (see p 100):

> The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative, then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case.

[64] After calling the defence of the respondent for the offence of trafficking in dangerous drugs, if the respondent elected to remain silent then the learned High Court judge must convict the respondent forthwith. But the respondent elected to give evidence on oath and his evidence tallied with the cross-examinations of SP5, SP6, SP7, SP9 and SP10 in regard to Ayub, Zul, Ramli Abo and the respondent's wife. That should not sway the learned High Court judge from changing his mind. After his defence was called, the respondent elected to give his evidence on oath, then the steps set out in *Mat v Public Prosecutor* [1963] MLJ 263 should be followed. Here, the respondent was caught red handed with the package (exh P5A) containing the dangerous drugs put in the front part of the respondent's underwear and he was alone at that time.

[65] SP5 was cross-examined and he disagreed that the respondent had told him that the respondent's employer named Ayub from Batam had requested the respondent to collect the 'barang' (referring to the package (exh P5A)) from Zul in Kuala Lumpur and *SP5 further disagreed* that Ayub had advised the respondent to take special care of the 'barang' (referring to the package (exh P5A)). SP5 reiterated under cross-examination that the package (exh P5A) was tucked in the front part of the respondent's underwear.

[66] SP6 in his cross-examination *disagreed* that the respondent mentioned the name of Ayub to SP5. *SP6 also disagreed* under cross-examination that the respondent had informed SP5 that the respondent was not the owner of the drugs. SP6 reiterated under cross-examination that the drugs were found tucked in the front part of the respondent's underwear.

[67] SP7 was cross-examined *and he disagreed* that the respondent had told him that his employer by the name of Ayub had asked him to carry the 'barang' (referring to the package (exh P5A)).

[68] SP9 was also cross-examined *and he disagreed* to a suggestion by the respondent that the respondent's employer named Ayub had requested the

respondent to collect the 'barang' (referring to the package (exh P5A)) and the calligraphy from Zul in Kuala Lumpur.

[69] SP10 in his cross-examination *agreed* that the respondent had informed him that the respondent's employer by the name of Ayub from Batam had requested him to collect the 'barang' (referring to the package (exh P5A)) and the calligraphy from Zul in Kuala Lumpur. *SP10 disagreed* under cross-examination that the respondent had told him about the respondent's employment address in Batam. *SP10 agreed* under cross-examination that the respondent had told him about the respondent's address in Batam as recorded in the search list in exh P20 and *SP10 also agreed* that the respondent had told him that the respondent's wife stayed in the address as stipulated in the search list ('P20'). *SP10 disagreed* under cross-examination that the respondent had told him that if Ramli Abo could be traced, Ramli Abo could assist in locating Ayub. Under cross-examination, *SP10 agreed* that without contacting interpol he missed out the opportunity of tracing Ramli Abo. *SP10 agreed* under cross-examination that he did not write to the respondent's wife in order to ascertain the respondent's employer. Still under cross-examination, SP10 said:

(a) that he did not obtain the assistance of Batam's police;

(b) that he disagreed that attempts to trace Ayub were incomplete;

(c) that he disagreed that his investigations were incomplete; and

(d) he did not take the finger nail clippings of the respondent.

[70] In his re-examination, SP10 testified as follows:

(a) that in his investigation he did not attempt to look for Ayub because the particulars of Ayub were not complete;

(b) that he did not attempt to locate Ramli Abo because the latter has no connection with the case; and

(c) he did not attempt to trace the respondent's wife because she has no connection with the case.

[71] The burden is shifted to the respondent to rebut the presumption of trafficking under s 37(da)(xvi) of the Act on the balance of probabilities. This evidential burden is 'heavier than the burden of casting a reasonable doubt but is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt' (per Mohamed Azmi SCJ in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169). In our judgment, the respondent has failed to rebut the presumption of trafficking on the balance of probabilities.

[72] The burden is also on the respondent to raise a reasonable doubt in the prosecution's case. The respondent's defence or explanation to the charge preferred against him must be capable of belief in the sense that it is true or reasonable and it succeeds in creating a reasonable doubt in the prosecution's case (*Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; and *Mat v Public Prosecutor* [1963] MLJ 263). The defence as alluded to earlier put the blame on Ayub and Zul. But at the time of his arrest, the respondent was alone with the drugs inside the front part of his underwear. In our judgment, the respondent's defence is not reasonable and it does not create a reasonable doubt in the prosecution's case. Just because the prosecution could not trace Ayub and Zul, that does not entitle the respondent to an acquittal. We agree with the submission of the learned deputy public prosecutor that the respondent was in possession of the dangerous drugs at the material time as per the charge. And what transpired *before* the arrest of the respondent was not for the prosecution to prove. It was entirely up to the respondent to prove. The prosecution was only concerned that on 22 May 2005 at about 7.45am at the place stated in the charge, the respondent was trafficking in dangerous drugs, to wit, 284.23g of methamphetamine. In *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401, at pp 429–430, Augustine Paul J (later FCJ) correctly sets out the law in these erudite terms:

> Generally, in a criminal trial, there is no burden on an accused to call witnesses (see *Goh Ah Yew v Public Prosecutor* [1949] MLJ 150; *Abu Bakar v R* [1963] MLJ 288; *Tan Foo Su v Public Prosecutor* [1967] 2 MLJ 19). Thus, no adverse inference can be drawn against the defence for a failure to call witnessess. However, such an inference may be drawn where there is an onus on the accused to prove an issue (see *Baharom v Public Prosecutor* [1960] MLJ 249). An onus may be placed on the accused in certain instances by statutory presumptions. The legal burden is then on the accused to negate the presumed fact. In order to discharge the burden, there will be an onus on the defence to call material witnesses (see *Liew Siew & Anor v Public Prosecutor* [1969] 2 MLJ 232). Failure to do so will warrant the drawing of an adverse inference. In this case, a presumption of trafficking has been drawn against the first accused. The onus is on him to prove, on the balance of probabilities, that he was not trafficking in the drugs. An adverse inference would be drawn against him for failure to call material witnesses on this issue.

[73] We categorically say that when there is an onus placed on the respondent to prove, on the balance of probabilities, that he was not trafficking in the dangerous drugs, and in order to discharge that burden the respondent has the onus of calling material witnesses like Ayub and Zul. And the failure to do so would entitle the court to draw an adverse inference against the respondent.

[74] It must be recalled that SP10 testified that the information given by the respondent to him was not sufficient to trace Ayub and Zul. In our judgment, the prosecution should not be blamed for its inability to trace Ayub and Zul. The onus is placed on the shoulders of the respondent to call Ayub and Zul.

[75] In *Ghazalee Kassim & Ors v Public Prosecutor* [2009] 4 CLJ 737 (FC), the headnote reads as follows:

> Held 2: There was no evidence to show that the prosecution had intentionally withheld the production of Ah Meng as a witness. In fact, according to one ASP Zulkifly Ali, Ah Meng could not be traced. Anybody in Ah Meng's position would have just lost himself. To be traced and to come to court after leading the police to the arrest of the three appellants would be to expose himself to, possibly, death.

[76] For the reasons alluded to above, we unanimously allowed the appeal of the prosecution. We set aside the conviction and sentence of the High Court on the respondent under s 12(2) of the Act and punishable under s 39A(2) of the Act and we substituted it with a conviction under s 39B(1)(a) of the Act and punishable under s 39B(2) of the Act.

[77] In his mitigation, the respondent — an Indonesian, stated that he is married and stayed in Batam. The respondent also said that he works in a provision shop in Batam and this is his first offence.

[78] After hearing the mitigation, we sentenced him to death as mandated by the law in accordance with s 277 of the Criminal Procedure Code. The respondent is to be hanged by the neck till he is dead.

Appeal allowed, High Court's conviction and sentence substituted with conviction

under s 39B(1)(a) of the Act and respondent sentenced to death.

Reported by Ashok Kumar